

Union Calendar No. 741

81ST CONGRESS } HOUSE OF REPRESENTATIVES { REPORT  
2d Session } No. 1976

REORGANIZATION PLAN NO. 5 OF 1950

*Delegation?*  
*Authority*  
*see page 10*

MAY 2, 1950.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DAWSON, from the Committee on Expenditures in the Executive Departments, submitted the following

REPORT

[To accompany H. Res. 546]

The Committee on Expenditures in the Executive Departments, to whom was referred the resolution (H. Res. 546) rejecting Reorganization Plan No. 5 of 1950, having considered the same, report unfavorably thereon without amendment and recommend that the resolution do not pass.

GENERAL STATEMENT

The purpose of House Resolution 546 is to express disapproval of Reorganization Plan No. 5 of 1950, transmitted to the Congress by the President on the 13th day of March 1950, and the effect of the adoption of this resolution by the Congress will be to prevent such plan from coming into force and effect on May 12, 1950, mindful, however, that under section 6 (b) (2) of the Reorganization Act of 1949 (Public Law 109, 81st Cong.), that from the 60-day period there shall be excluded the days on which either House is not in session because of an adjournment of more than 3 days to a day certain.

The scope and the effect of the reorganization plan, in the absence of a disapproval by a House resolution, are set forth in the plan in the following words and figures:

DEPARTMENT OF COMMERCE

SECTION 1. *Transfer of functions to the Secretary.*—(a) Except as otherwise provided in subsection (b) of this section, there are hereby transferred to the Secretary of Commerce all functions of all other officers of the Department of Commerce and all functions of all agencies and employees of such Department.  
(b) This section shall not apply to the functions vested by the Administrative Procedure Act (60 Stat. 237) in hearing examiners employed by the Department of Commerce, nor to the functions of the Civil Aeronautics Board, of the Inland

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Waterways Corporation, or of the Advisory Board of the Inland Waterways Corporation.

**SEC. 2. Performance of functions of Secretary.**—The Secretary of Commerce may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Commerce of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

**SEC. 3. Administrative Assistant Secretary.**—There shall be in the Department of Commerce an Administrative Assistant Secretary of Commerce, who shall be appointed, with the approval of the President, by the Secretary of Commerce under the classified civil service, who shall perform such duties as the Secretary of Commerce shall prescribe, and who shall receive compensation at the rate of \$14,000 per annum.

**SEC. 4. Incidental transfers.**—The Secretary of Commerce may from time to time effect such transfers within the Department of Commerce of any of the records, property, personnel, and unexpended balances (available or to be made available) of appropriations, allocations, and other funds of such Department as he may deem necessary in order to carry out the provisions of this reorganization plan.

# REORGANIZATION PLAN NO. 5 OF 1950—REORGANIZATIONS IN THE DEPARTMENT OF Commerce

## SECTION-BY-SECTION ANALYSIS

**Section 1.**—This reorganization plan, in general, transfers:

(a) All functions of all other officers of the Department of Commerce and all functions of all agencies and employees of such Department to the Secretary of Commerce;

(b) However, this section shall not apply to the functions vested by the Administrative Procedure Act (60 Stat. 237) in hearing examiners employed by the Department of Commerce; the functions of the Civil Aeronautics Board, a regulatory body placed in the Department for "housekeeping" purposes, and the Inland Waterways Corporation, and Advisory Board of the Inland Waterways Corporations, in recognition of their corporate structures, are excepted from the operation of this subsection.

**Section 2. Performance of functions of Secretary (delegative powers).**—This permits the Secretary of Commerce to make provision, from time to time, as he deems appropriate, authorizing the performance by any other officer, or by any agency or employee, of the Department of Commerce, of any function of the Secretary. These powers so delegable shall include any function transferred to the Secretary by the provisions of this reorganization plan.

**Section 3. Administrative Assistant Secretary.**—This contemplates appointment by the Secretary of Commerce under the classified civil service of an Administrative Assistant Secretary of Commerce. This appointment would be subject to the approval of the President. This new officer shall perform such duties as the Secretary of Commerce shall prescribe. The rate of compensation fixed for this officer is that which has been found to prevail in respect of comparable officers in the executive branch of the Government.

**Section 4. Incidental transfers.**—The Secretary of Commerce may, as he deems necessary in order to carry out the provisions of this reorganization plan, from time to time, effect such transfers within the Department of Commerce of any of the records, property, personnel, and unexpended balances (available or to be made available) of appropriations, allocations, and other funds of the Department.

#### ADDENDUM

The subject matter embodied in this bill has been of genuine interest to many responsible individuals, organizations, and the general public. Your committee has received many statements, telegrams, and letters, advancing various viewpoints, suggestions, and constructive observations, all of which have proved of immeasurable value. It is contemplated, that insofar as practicable and consistent with the committee policy and economy, these comments and filed statements will be incorporated in the record of our hearings.

In addition, your committee was aided during their deliberations by the excellent presentations made by the many witnesses who appeared both in favor of and in opposition to Reorganization Plan No. 5. From the worth-while analytical nature of their statements, and the inestimable benefit of the interrogatories and colloquies that ensued in the queries by the members there was fully developed the many sound business organization principles underlying and inherent in this reorganization plan. Extensive hearings produced mutual exchanges of views and afforded opportunities for study and evaluation which proved beneficial in the consideration of this management phase of the Presidential program, and materially contributed to the deliberations of your committee.

This reorganization plan contains a pattern which is familiar to the Congress; it exhibits no features necessarily unique. Its principles have been universally adopted in industry in the interest of efficient management and administrative improvement. A survey of the pertinent recommendations of the Commission on Organization of the Executive Branch of the Government, and a complete review of statements filed with the committee, when added to the opportunities presented for cross-examination of witnesses, have developed the necessary and basic information which guided your committee in its decision to reject House Resolution 546.

#### PURPOSE OF REORGANIZATION PLAN NO. 5

Reorganization Plan No. 5, in general, transfers to the Secretary of Commerce all functions of all other officers of the Department of Commerce. Besides listed exemptions, certain restrictions on these powers are disclosed by reference to the Administrative Procedures Act. In this way independency of action on the part of hearing examiners is assured. Further the power of the Secretary to delegate to subordinate officers and agencies the performance of his functions where desirable is provided for. Moreover, records, property, personnel, unexpended balances, and other funds may be transferred within the Department of Commerce, whenever it is deemed necessary by the Secretary of Commerce for the purposes of carrying out the provisions of this reorganization plan.

This plan is one of a group of six similar plans recently submitted by the President, proposing parallel departmental reorganizations for the Departments of Treasury, Justice, Interior, Agriculture, Commerce, and Labor.

This organization plan will not ascribe to the Department of Commerce any more powers, authority, functions, or responsibilities than it now possesses. In the main, this legislation will centralize authority,

responsibility, and accountability in the Secretary. This action, of course, carries with it as its necessary concomitant proper delegation of powers and duties on the part of the Secretary.

The Commission on Organization of the Executive Branch of the Government, after a detailed study, emphasized in its initial report the urgency for and reposing "full responsibility for the conduct" of a department in its secretary.

In the report on General Management and its accompanying Task Force Report on Departmental Management, the Commission on Organization of the Executive Branch of the Government, went to some pains to propound the urgency in our Government for sound business management and unmistakable delineation of authority in "a clear line of authority reaching down through every step of the organization." The gist of their thesis tersely stated is: If the superior is responsible and accountable then no subordinate should "have authority independent from that of his superior."

Reorganization Plan No. 5, thus it is seen, coincides with the recommendations the Commission on Organization indicated as necessary for improved internal departmental management. The adoption of this plan by the Congress will result in unification of departmental organization which over a period of years will reward with economy of operation. Then also, the resultant centralization of responsibility and authority will effect rich returns through immediate improvement of efficiency in service.

#### ROLE AND MISSION OF THE DEPARTMENT OF COMMERCE

The Department of Commerce was established by the Congress in 1903. The labor functions of the Federal Government were also lodged in the Department, then termed the Department of Commerce and Labor. In 1913, the Department of Labor was created as a separate entity of Cabinet level. The major purpose of the Department of Commerce is recited in the organic act of 1903:

To foster, promote, and develop the foreign and domestic commerce; mining, manufacturing, shipping, fishery industry; and the transportation facilities of the United States.

It is readily apparent, therefore, that many of the recited functions and necessary authority are not included today in the framework of the Department. To this end, the Commission on Organization of the Executive Branch of the Government made numerous recommendations for the betterment of the organizational and operational structure of this Department.

#### FUNCTIONS OF AGENCIES OF THE DEPARTMENT OF COMMERCE

The following is a listing of the basic and most important statutes vesting functions and powers in the constituent subordinate agencies of the Department of Commerce. It will aid if it is recalled that these statutes do not in all cases give the complete picture. The powers of the subordinate agencies and their heads are limited, in varying degrees, by the supervisory authority which the Secretary or the Department has over the administration of the functions of such agencies.

The extent of this supervisory authority in many instances is not clear at the present time, either because of lack of explicitness in the statutes purporting to define it or arising out of judicial decisions or administrative opinions interpreting such statutes.

The purpose of section 1 of Reorganization Plan No. 5 of 1950 is to make it clear that (subject to a few specific exceptions) all functions of all officers and of all agencies and employees of the Department are vested in the Secretary. Section 2 of the plan provides that the Secretary may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of any of these functions.

MAJOR ADMINISTRATIVE UNITS IN THE DEPARTMENT OF COMMERCE

*Weather Bureau.*—Act of October 1, 1890 (ch. 1266, sec. 3, 26 Stat. 653).—Provides that the Chief of the Weather Bureau shall have charge of forecasting weather, displaying weather signals, issuing storm warnings, etc.

*Civil Aeronautics Administration.*—1940 Reorganization Plan No. III (sec. 7, effective June 30, 1940, 5 F. R. 2107, 54 Stat. 1231).—Provides that certain specified functions relating to civil aeronautics shall be vested in the Administrator of Civil Aeronautics.

*Bureau of the Census.*—Act of March 6, 1902 (ch. 139, sec. 3, 32 Stat. 51).—Establishes a permanent Census Office (now Bureau of the Census), with its duties to be superintended and directed by the Director of the Census.

*National Bureau of Standards.*—Act of March 3, 1901 (ch. 872, 31 Stat. 1449).—Establishes an Office of Standard Weights and Measures (now the National Bureau of Standards), with its equipment and the exercise of its functions to be under the supervision of a director.

*Bureau of Foreign and Domestic Commerce.*—Act of August 23, 1912 (ch. 350, sec. 1, 37 Stat. 407).—Establishes the Bureau of Foreign and Domestic Commerce, with duties of fostering, promoting, and developing commerce by gathering and publishing statistical information to be performed by that Bureau.

*Coast and Geodetic Survey.*—Act of August 6, 1947 (ch. 504, sec. 1, 61 Stat. 787).—Defines the functions and duties of the Coast and Geodetic Survey, with the provisions that the Director of the Coast and Geodetic Survey is authorized to conduct the activities specified.

*Patent Office.*—Act of July 8, 1870 (ch. 230, 16 Stat. 198).—Establishes the Patent Office in the Department of the Interior, imposing upon the Commissioner of Patents the duty of superintending or performing all the duties respecting the granting and issuing of patents. (This unit is taken up in particularity in another part of our report.)

*Bureau of Public Roads.*—Act of July 11, 1916 (ch. 241, 39 Stat. 355).—Authorizes the Secretary of Agriculture to cooperate with the States in the construction of roads, and to make rules and regulations for carrying out the provisions of the Act. In accordance with this authority, the Secretary of Agriculture established the Office of Public Roads and Rural Engineering (now the Bureau of Public Roads) to carry out these functions.

BASIS FOR REORGANIZATION PLAN No. 5

THE RECOMMENDATIONS ON GENERAL MANAGEMENT, COMMISSION ON  
ORGANIZATION OF THE EXECUTIVE BRANCH

To more thoroughly understand the well-developed, industry-tried principles upon which this reorganization plan is based, your committee recites the following from the Commission on Organization's Report on General Management:

*Recommendation No. 13*

Within each department, the subsidiary bureaus should also be grouped as nearly as possible according to major purposes.

\* \* \* \* \*

This report also went on to state that of particular importance was:

*Recommendation No. 14*

Under the President, the heads of departments must hold full responsibility for the conduct of their departments. There must be a clear line of authority reaching down through every step of the organization and no subordinate should have authority independent from that of his superior.

\* \* \* \* \*

Recognition for need of proper staff assistance found expression in:

*Recommendation No. 16*

Department heads must have adequate staff assistance if they are to achieve efficiency and economy in departmental operations.

\* \* \* \* \*

Further, the Commission on Organization were insistent on pointing out:

*Recommendation No. 18*

Each department head should receive from the Congress administrative authority to organize his department and to place him in control of its administration.

\* \* \* \* \*

In its Report on General Management (pp. 32-33) the Commission on Organization again observed:

The line of authority from departmental heads through subordinates is often abridged by independent authority granted to bureau or division heads, sometimes through congressional act or stipulations in appropriations. Department heads, in many instances, do not have authority commensurate with their responsibilities. Such bureau autonomy undermines the authority of both the President and the department head. There is therefore a lack of departmental integration in performing the department's major mission.

In addition to this, the Commission went on to state:

The department heads in most cases lack sufficient authority to assign within their departments such responsibility as would promote efficiency and economy.

Then the Commission on Organization in singling out this facet in its report on the Department of Commerce had this to say:

We have urged in our first report that the foundation of good departmental administration is that the Secretary shall have authority from the Congress to organize and control his organization, and that separate authority to subordinates be eliminated.

The pattern which Reorganization Plan No. 5 proposes, and which is similar in the reorganization plans for the major departments enumerated in Reorganization Plans Nos. 1 to 6, has been drafted with the foregoing considerations in mind. The invaluable study and

well-tempered approach manifested in the recommendations of the Commission on Organization impel the adoption of this legislation as a sensible and businesslike approach to basic departmental organization and sound management operations in the governmental service.

#### TASK FORCE REPORT

#### SUMMARY OF DEPARTMENTAL MANAGEMENT, THE COMMISSION ON ORGANIZATION

As a citation in further support for Reorganization Plan No. 5, your committee sets out the following from the Task Force Report on Departmental Management:

##### *Grant of authority*

##### *Recommendation No. 5*

Department heads should have authority commensurate with the responsibility which they must exercise in the administrative structure of the executive branch.

It is axiomatic that the department head is called upon to assume responsibility for departmental policies and programs and for the over-all efficiency of his departmental operations. In effect, he is necessarily accountable to the President and the Congress for the conduct of his department. It follows that he must also possess the necessary correlative authority, if he is to administer his department in keeping with his responsibility.

##### *Control over organization*

The task force went on to state:

##### *Recommendation No. 6*

The department heads should have general discretion to determine the operating organization to perform the responsibilities vested in their respective departments.

In this manner the department head can make the occasional adjustments in administrative detail necessary for the proper effectuation of governmental programs. His authority to take action when he is convinced that such energy on his part will promote efficiency and economy in the performance of governmental service will prove both a spur and a challenge. It would be well to note that the Secretaries of State and Agriculture, the Postmaster General, and the Administrator of Veterans' Affairs, already possess such discretion.

##### *Departmental objectives*

In the following recommendation the task force emphasized:

The goal of departmental management must be effective direction and supervision of an agency's work in the interest of a common purpose, under defined policies, through methods which insure the necessary work accomplishment in the most efficient possible manner.

They especially noted that—

The quality and the economy of all Government services depend finally upon the department head, and his departmental management.

*Bureau authority*  
*Recommendation No. 7*

Departmental management, especially in the holding company type of department, is often undermined by bureau "autonomy."

In this connection the task force deplored the instances where the Congress has worked directly with bureaus rather than through department heads:

This has been particularly the case when certain types of new activities have been started with performance vested in some bureau created by law and lodged for some vague reason in a particular department. In these instances all of the authority of the substantive law lies with the bureau chief, not the department head. The authority of the department head for the particular activity depends upon his vague responsibility to supervise his department.

This is of even more compelling implication when frequently a bureau is related by nature but cut adrift to float unmoored within the departmental structure.

*Unity in structure*  
*Recommendation No. 12*

In order to fulfill its administrative purpose, a department needs well-defined elements of cohesion or unity in departmental structure.

This must obtain if a department is to effect the intention behind its creation. From this perforce, will arise a single policy, a clear program, readily apparent responsibility, and stimulation of leadership and morale.

EXEMPTIONS IN REORGANIZATION PLAN No. 5

Hearing examiners are exempted under the provisions of this plan since their functions are vested by the Administrative Procedure Act (60 Stat. 237). The major purpose of the Administrative Procedure Act was to provide for a separation of the prosecutive and judicial functions. It was the intent of that legislation that where the review was limited to the record and a later action de novo could not be had, impartiality and independence would be preserved through a separation of the prosecutive and judicial functions. Accordingly, in drafting plan No. 5, provision was recited therein for the exclusion of hearing examiners protected by the Administrative Procedure Act.

In plan No. 5, also, the Inland Waterways Corporation and the Advisory Board of the Inland Waterways Corporation are exempted from the operations of this reorganization. This was a deliberate act aimed at the recognition of corporate structure. It is desirable that corporate functions remain associated with the corporate framework. The heads of executive departments presently possess adequate authority over these corporations placed in the respective departments. In these corporations alluded to, the Secretary, as the presiding head, has administrative control and direction of the corporation.

The third and last exemption involves the Civil Aeronautics Board. This body has its functions vested in a board possessing in large measure the qualities of an independent regulatory board, and reposes within the structure of the Department of Commerce largely for house-keeping purposes. In this manner recognition is given to the thesis



that a board can oftentimes prove a more effective instrument for fulfilling responsibilities which are primarily of a regulatory nature.

#### PRACTICABILITY OF THE TRANSFER OF THESE FUNCTIONS

Reorganization Plan No. 5 is one segment of a comprehensive program for stepping up the quality and efficiency of administrative practices in the major executive departments. As has been brought out previously, it is one of six similar plans covering the major executive agencies. The goals to be attained for the Commerce Department in organizational structure and authority and responsibility have already been carried out by special legislation in the cases of the Departments of State, Defense, and Post Office. The cornerstone of this design for improved governmental administration is centralization of responsibility and authority in the heads of departments, marked by unmistakably lucid delegations of authority and with assurances for adequate flexibility of organizational structure and administration to meet the needs of changing conditions and circumstances.

In Reorganization Plan No. 5 of 1950 recognition is given to the recommendations of the Commission on Organization, for in their report on the Department of Commerce they stated:

We have urged in our first report that the foundation of good departmental administration is that the Secretary shall have authority from the Congress to organize and control his organization, and that separate authority to subordinates be eliminated.

It went on to add:

The Secretary should determine the organization \* \* \* and be free to amend it (p. 6).

The functions of the principal operating agencies of the Department of Commerce are directly vested in bureaus. In this manner are constituted the Bureau of the Census, the Bureau of Foreign and Domestic Commerce, the Weather Bureau, the National Bureau of Standards, the Patent Office, Coast and Geodetic Survey, and the Civil Aeronautics Administration. The Task Force on Departmental Management deplored the instances where the Congress has worked directly with bureaus rather than through department heads:

This has been particularly the case where certain types of new activities have been started with performance vested in some bureau created by law and lodged for some vague reason in a particular department. In these instances all of the authority of the substantive law lies with the bureau chief, not the department head. The authority of the department head for the particular activity depends upon his vague responsibility to supervise his department.

For sound administration, no bureau related by nature to the role and mission of the Department of Commerce should be allowed to float unmoored within the departmental structure. By force of Reorganization Plan No. 5 the functions of all these agencies recited would be transferred to the Secretary of Commerce. The Secretary by the recent transfer of the Bureau of Public Roads to the Department of Commerce, gained greater scope in his direction and control over this Bureau. Accordingly this legislation would have little effect on that Bureau.

The reorganization plan under discussion would give the Secretary of Commerce power to make necessary changes in the organization

and administration of the Department of Commerce as he deems advantageous for departmental performance in terms of economy and efficiency. However, on the other hand, it should be underscored that no specific change is made mandatory by the provisions of this reorganization plan.

In its proposed departmental structure for the Department of Commerce, the Commission on Organization of the Executive Branch of the Government took cognizance of the Patent Office, as an element and component of the Department (Report on Commerce, p. 7).

Finally it should be high-lighted that the harmonious relationship existing between the present Secretary and his Bureau heads, resulting in mutual cooperation and collaboration, has brought about a unified approach to the problems of the Department. Yet, it should be understood that this is cooperation based on personalities. There is no statutory basis for it; Reorganization Plan No. 5 would build and assure this foundation through legislative action.

#### ADMINISTRATIVE ASPECTS WITHIN THE DEPARTMENT OF COMMERCE

The purpose of Reorganization Plan No. 5 of 1950 is to spell out with clarity that all functions of all officers of the Department of Commerce and all functions of all agencies and employees of the Department are vested by force of this legislation in the Secretary of Commerce.

The success of such reorganization is grounded on the tenet of proper delegation.

This plan, in common with all plans, 1 through 6, provides for the keystone of sound business management—proper delegation—urgently insisted upon by the Commission on Organization. Successful administration is always spelled out in proper delegation of administrative duties to the staff under the direction of a superior. Further, delegation to subordinates carries with it an added connotation if it is to be truly beneficial to administrative practices. It contemplates the factor of successive redelegations. Where a superior delegates to a bureau head, and the latter must return to the superior for personalized permission for successive redelegation, in the opinion of the committee, such a procedure militates against prompt dispatch and expeditious handling of multiple tasks. There is adequate safeguard against unwarranted usurpation of power in the hands of a subordinate, since each is ultimately in turn responsible to his delegating superior.

At present, generally speaking, the Secretary has broad and somewhat vague power to regulate bureaus in his Department. The tenor of his control, indeed, varies from bureau to bureau and the basis for his control is checkered and unequal. For keener grasp of the functions of the component bureaus of the Department, it would be advantageous to briefly indicate their powers and the present extent of supervisory authority in the Secretary of Commerce.

#### *National Bureau of Standards*

This agency has its functions vested in the Bureau; however, the Bureau is "under the jurisdiction and supervision of" the Commerce Department.

*Bureau of Foreign and Domestic Commerce*

The functions of this agency are vested in the Bureau "under the jurisdiction and supervision of" the Commerce Department.

*Bureau of the Census*

The functions of this Bureau are vested in the Director of the Census. However, the Bureau operates "under the jurisdiction of" the Department and many of its numerous functions within the Bureau require the approval of the Secretary.

*Weather Bureau*

The functions of this agency are vested in the Chief of the Weather Bureau, which is "administered under the direction and supervision of the Secretary of Commerce."

*Coast and Geodetic Survey*

The functions of this agency are vested in the Director of the Coast and Geodetic Survey, but are administered "under the direction of the Secretary of Commerce."

*Civil Aeronautics Administration*

The functions of this agency are vested in the Administrator of Civil Aeronautics Administration, being "administered under the direction and supervision of the Secretary of Commerce."

*Bureau of Public Roads*

As a result of recent legislation effecting this transfer to the Department of Commerce, the functions of this Bureau are authorized by law to be "performed by the Secretary or, subject to his direction and control, by such officers, employees, and agencies of the Department of Commerce as the Secretary shall designate."

It will be seen that, in the light of the foregoing, most of the functions of the constituent subordinate agencies within the Department are vested in the heads of those agencies, or in the agencies themselves, and the administration of the functions is subject to varying degrees of supervision, direction, and control by the Secretary, or by the Commerce Department itself.

In addition, these agencies, in reposing within the framework of the Department, have placed the Secretary in a focal point of responsibility with a general aura of authority. Under the Budget and Accounting Act of 1921, the Secretary is responsible for the budget of the entire Department, a most influential instrument. In addition Revised Statutes, section 161, 5 United States Code, section 22 gives the head of the Department the authority to prescribe regulations, not inconsistent with law, for the governing of his Department.

In view of the fact that the paramount objection to plan No. 5 lies in the future basis for administration of the Patent Office, it has been deemed desirable that the salient features of that Office be treated in our report in the accompanying division of the subject matter.

EFFECT OF PLAN NO. 5 ON THE PATENT OFFICE

In the main, a scrutiny of the testimony and statements on file impel the conclusion that the paramount objections to plan No. 5 are centered in the possible effects of the plan upon the Patent Office.

Briefly, it should be stated that the Patent Office reposed within the province of the State Department from 1793 to 1849, in the Department of the Interior from 1849 to 1925, and has been situated in the Department of Commerce from 1925 to the present day.

A little reference should be had to present authority and supervision by the Secretary in regard to the Patent Office. In the statute which established its present residence it is recognized as being "in the Department of Commerce" (35 U. S. C. 1). In general, as has been previously pointed out, the functions of the Patent Office are vested in the Commissioner, under the direction of the Secretary (35 U. S. C. 6). In addition, the foregoing statute permits the Commissioner of Patents to establish regulations and rules governing the conduct of proceedings in the Patent Office, but states that these rules are subject to the approval of the Secretary of Commerce. The hierarchy of the Patent Office consists of a Commissioner of Patents, one First Assistant Commissioner, two Assistant Commissioners, and nine Examiners in Chief, appointed by the President, by and with the consent of the Senate. One further point should be emphasized:

All other officers, clerks, and employees authorized by law for the office shall be appointed by the Secretary of Commerce upon the nomination of the Commissioner of Patents in accordance with existing law (35 U. S. C. 2).

The role of the Patent Office is the undertaking of basic responsibility for examining applications for patents and issuing patents upon approval of such applications. The registration of trade-marks is performed in a similar manner. In order to understand the operations of the functions vested in the Patent Office it would be well to describe briefly the basic patent procedure. An application for a patent is referred to one of the 70 Patent Office divisions, which studies the application and searches all prior United States and foreign patents. The division may approve the application if it finds the invention patentable, and a patent is then issued.

If the final decision of the division is adverse, the applicant may appeal to the Board of Appeals of the Patent Office and have an oral hearing. Incidentally, the members of this Board are nominated by the President and confirmed by the Senate. They must be persons of "competent legal knowledge and scientific ability."

From an adverse decision of the Board of Appeals, an appeal may be taken to the United States Court of Customs and Patent Appeals, which may review the case on the basis of the record; or a civil action may be brought against the Commissioner in the United States District Court for the District of Columbia. The district court may consider the case de novo.

The procedure for trade-marks follows in a general way that relating to patent application, except that the internal appeal is to the Commissioner of Patents in person.

During the fiscal year 1949, the Patent Office finally disposed of 76,298 patent applications, and actually issued 34,815 patents. The number of patent interferences terminated was 498. The number of appeals disposed of by the Board of Appeals was 3,388. The Patent Office has approximately 2,000 employees. The Patent Office in former years has been to a large extent financially self-sustaining. However, during the last completed fiscal year, 1949, expenses exceeded income by \$4,900,000. Thus the income of the Office in 1949 was only slightly more than half the expenses.

The functions of the Patent Office have many characteristics of judicial actions, in that private rights are involved, the public is a party at interest, and exclusive rights are granted through the issuance of patents under governmental protection to private individuals. Also, much reference has been made during the testimony and in the filed statements presented to your committee of the legislative and judicial functions reposing in the Patent Office. The committee is agreed that this basis of objection to this reorganization plan is without merit. The Administrative Procedure Act, it will be recalled, was enacted to safeguard the exercise of legislative and judicial functions. Independent hearing examiners acting under prescribed procedures in hearings assured impartiality and expertness in hearings required by statutes where legislative or judicial functions were involved. However, the Administrative Procedure Act exempted the Patent Office from the requirement of hearing examiners. This was expressly done at the recommendation of the House and Senate Committees on Judiciary, which stated that—

Whatever judgment the agency makes is effective only in a prima facie sense at most, and the party aggrieved is entitled to complete judiciary retrial and decision.<sup>1</sup>

Thus an applicant is entitled to a trial de novo from the findings of the patent examiner.

The reorganization plan under discussion in no way limits or restricts the court review of the actions of the Patent Office.

Some concern has been manifested that the delegation of functions to the Secretary might or could transfer the functions of the Patent Office to some unqualified or nontechnical bureau chief within the Department. Along these lines, in rejoinder, it would be well to cite from the testimony of our hearings the words of Secretary Charles Sawyer:

I have no intention of changing the present procedures or the present powers of the Patent Commissioner or the Patent Office, and I have already announced my intention of authorizing the Commissioner and the Patent Office to continue to carry on their functions in accordance with their present statutory powers. I have prepared a draft of such an order which I would be glad to make available \* \* \*.

In these words we have the statement of the Secretary of Commerce that he would retain the present organization and procedures for the administration of patent affairs, barring a presently unforeseen major defect which would develop in future patent administration.

Some comment has been directed to the susceptibility to political considerations which would inure from the vesting of the proposed transfer of functions under this plan to a Secretary. In the opinion of your committee the exercise of improper influence upon patent determinations or the affairs of the remaining bureaus of the Department is untenable. In the case of the Patent Office, a Secretary and a Commissioner of Patents are appointed in the same fashion and are removable from office in the same manner. By statute no specific background of experience or education is required for occupancy of either office. The comment evoked on this subject presupposes that a Secretary would be enabled to act in some dark or devious

<sup>1</sup> 1 S. Rept. No. 752, 79th Cong., 1st sess., on S. 7, p. 202 of Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d sess.; see also Senate Judiciary Committee Print, June 1945, at pp. 21-22 of S. Doc. No. 248, 79th Cong.; H. Rept. No. 1980, 79th Cong., 2d sess., p. 260 of S. Doc. No. 248, 79th Cong.

manner in some inner recesses of his Department where the light of day could not show. Of course, this is impossible. The actions of a Secretary are subject to public scrutiny. In addition, there is attempted to be ascribed to a Secretary the capacity for arbitrary whim or caprice in the administration of the functions vested in him. Your committee finds that such could not be the case in view of the opportunities for appraisal by the public and the great segment of the business world interested in the affairs of the Department of Commerce. A Secretary would be put in the unrewarding circumstance of defending an indefensible position. Although the plan permits the possibility of transferring these functions to some other officer, a guaranty remains in the accountability of a Secretary for his actions.

In closing, much has been said of the necessity for a skilled and professional background for the administration of the functions of the Patent Office. It should be emphasized that this is true of virtually all of the work of the Commerce Department. The Civil Aeronautics Administration, the Bureau of Standards, the Census Bureau, the Coast and Geodetic Survey, and the Weather Bureau all have important tasks requiring the highest degree of professional skill and conduct. The Civil Aeronautics Administration, in its certification of airmen, aircraft, and air carriers, must exercise a similar semijudicial responsibility. The decision has a financial effect on the company or individual requesting certification; it also affects the property and lives of the public. The granting or denial of applications of export licenses under the Export Control Act also may have semijudicial aspects and may involve great loss or profit to exporter applicants.

During the testimony of our hearings mention was made of the case of *Butterworth v. Hoe* (112 U. S. 50, U. S. Supreme Court). The pertinent facts of this case briefly outlined indicate that an applicant for a patent had his application refused by an examiner, and the award was made to another party. The Commissioner of Patents reversed the decision of the Examiner in Chief and awarded the judgment to the original applicant. The loser in this action took an appeal to the Secretary of the Interior (where the Patent Office then resided). The Secretary reversed the decision of the Commissioner. The Supreme Court had to decide the question then whether the Secretary of the Interior could reverse an adjudication of the Commissioner based on the Secretary's authority as the head of the Department to supervise and direct the granting of patents. The Court observed:

The conclusion cannot be resisted that, to whatever else supervision and direction on the part of the head of the Department may extend, in respect to matters purely administrative and executive they do not extend to a review of the action of the Commissioner of Patents in those cases in which, by law, he is appointed to exercise his discretion judicially. It is not consistent with the idea of judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates. Such a subjection takes from it the quality of a judicial act. That it was intended that the Commissioner of Patents, in issuing or withholding patents, in reissues, interferences, and extensions, should exercise quasi-judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed.

Reorganization Plan No. 5 is alleged to have the possibility for overturning this Court decision on the quasi-judicial actions of the Commissioner. It is important to keep a number of considerations in

mind with respect to this phase. First, the quasi-judicial character of the Patent Office is not of such a nature as to make its findings, if supported by substantial evidence, conclusive as is the case in many of our other administrative agencies. No Secretary is going to fly in the face of the incontrovertible weight of evidence, since there is always ability on the part of the applicant to seek a trial de novo in a Federal court. Another important point to be recalled is that this case was decided in 1884. Three years later the Interstate Commerce Commission was created. Now, when we recall that the Interstate Commerce Commission was the first of such administrative, quasi-legislative, and quasi-judicial commissions as we know them today, it is apparent that the earlier Court theory of 1884 did not have the advantage of the backlog of experience with the newer forms of governmental machinery for regulation, adjudication, and administration.

Lastly, it must be carried constantly in mind that if our major executive agencies are to perform and fulfill the role and mission for which they were created, the program designed for that Department must be supervised and directed from above, and whenever an agency or function is within that Department, the person at the head should have authority commensurate with his responsibility and accountability, and no subordinate should have a separate grant of authority related to that role or mission but independent of the head of that Department.

#### CONCLUSIONS: A SUMMARY

The President, through his Cabinet, is supplied with various viewpoints and specialized knowledge. It is the function of the President to appraise, evaluate, and balance these sources of information for the common good of the Nation. This must necessarily be kept in mind when reading the organic act creating the Department of Commerce. The Department of Commerce was instituted "to foster, promote, and develop the foreign and domestic commerce; the mining, manufacturing, shipping, fishery industry; and the transportation facilities of the United States." Still, the Secretary is obliged by virtue of his oath of office to administer the law in a fair and impartial manner. It is the duty of the Secretary to foster and promote the interests in these areas in the light of their rights and the rights of others under the law. It is the function of the President to coordinate the interests of commerce with the other segments of our national economy.

Reorganization Plan No. 5 provides that, except for functions vested in hearing examiners by the Administrative Procedure Act, and two listed exceptions, all functions vested in any other officer, agency, or employee of the Department of Commerce are transferred to the Secretary of Commerce. The Secretary is given delegative powers carrying with it power for successive redelegations, and provision is included for improved internal administration by regrouping powers vested in the Secretary.

This reorganization plan conforms in particularity to the pattern of organization recommended for each of the executive departments by the Commission on Organization of the Executive Branch of the Government. The structural and organizational framework is on all fours with the design proposed by the President for the Post Office De-

partment and the State Department and approved by the Eighty-first Congress. Finally, it is identical and in no respect different from the parallel plans presently proposed by the President for the Treasury, Justice, Interior, Agriculture, and Labor Departments, as shown by reference to Reorganization Plans No. 1 through No. 6.

The Department of Commerce will not hereby gain any more powers, authority, functions, or responsibilities than are already reposing in it. It will have only the force of centralizing authority in the Secretary, since he is already the repository of its correlatives, responsibility and accountability.

In the Department of Commerce in common with other executive departments an anomalous situation has been engendered in that there have been grants of independent authority to subordinate officials and bureaus within the departmental structure. For their actions the Congress and the public look to the Secretary for responsibility and accountability, but over which the Secretary has no authority. The harmony and cooperation that has thus obtained, however, is based on personal grounds, rather than on the requisite legislative basis that should at all times obtain.

It is not contemplated that the transfer of the functions of the Patent Office to the Secretary will militate against the best interests of the administration of that agency for the benefit of applicants, the public, or the legal profession. The Secretary of Commerce has stated that the Patent Office will continue as it is operating at the present time. Your committee did not feel that the transfer of the functions of this Office to the Secretary would disturb the integrity or impartiality of the judicial functions found therein since an appeal can always be taken to the Federal courts for a trial de novo.

In the light of the recommendations of the Commission on Organization which sanction and urge this unified pattern for sound departmental and organizational management, in the interest of more facile achievement of policy and program, Reorganization Plan No. 5 commends itself for its opportunity for improved efficiency of internal operation, with the inevitable economy attributable thereto. All this will be bolstered by a renewed surge of public confidence in executive departments administered by clearly delineated lines of authority and responsibility. For this plan measures up to the findings and recommendations of the Commission on Organization in the field of departmental management.

Executive departments of similar pattern can have an effect in efficiency and economy upon the entire Federal Government. Freer exchanges of information, speedier adoption of successful management program, together with ease of audit by the General Accounting Office, are but a few of the features that can stem from this reorganization program. Further, Reorganization Plan No. 5 commends itself for the opportunity it presents for improved efficiency of internal operation, and the inevitable economy that must thereby result. On every side this can only serve to increase public confidence in executive departments administered by clearly defined lines of authority and responsibility.



## MINORITY REPORT

Reorganization Plan No. 5<sup>1</sup> proposes to transfer to the Secretary of Commerce all functions of all other officers of the Department of Commerce, except those specifically exempted.

The four agencies whose officers are specifically exempted from the operation of plan No. 5 are the hearing examiners employed by the Department of Commerce; the Civil Aeronautics Board; the Inland Waterways Corporation; and the Advisory Board of the Inland Waterways Corporation.

No explanation is made as to why these bodies or agencies have been exempted, but the Secretary of Commerce in his testimony ventured the explanation that the hearing examiners employed by the Department of Commerce were to be exempted because of the judicial functions which they perform. Perhaps the functions of the Civil Aeronautics Board were also thought to be judicial or quasi judicial in nature and to thus warrant exemption from the operation of the plan. The Secretary has made the point that the inland waterways bodies were exempted because of the corporate form of organization.

Unless rejected, plan No. 5 will, among others, transfer to the Secretary of Commerce all functions of the Patent Office.

By plan No. 5 the Secretary is authorized to redelegate all functions which he acquires by virtue of the plan to such subordinates as he may select.

The Hoover report to the Congress on the Department of Commerce carries on page 8 a "proposed organization" of the Department of Commerce which shows some 16 bureaus or agencies grouped together as parts of the Department of Commerce. In this group is the Patent Office. A number of the other agencies of the group of 16 have for some time been under the general supervision of the Secretary of Commerce while others are for the first time, under plan No. 5, to be placed under the Secretary of Commerce.

<sup>1</sup> Reorganization Plan No. 5 of 1950, prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949:

### DEPARTMENT OF COMMERCE

SECTION 1. *Transfer of functions to the Secretary.*—(a) Except as otherwise provided in subsection (b) of this section, there are hereby transferred to the Secretary of Commerce all functions of all other officers of the Department of Commerce and all functions of all agencies and employees of such Department.

(b) This section shall not apply to the functions vested by the Administrative Procedure Act (60 Stat. 237) in hearing examiners employed by the Department of Commerce, nor to the functions of the Civil Aeronautics Board, of the Inland Waterways Corporation, or of the Advisory Board of the Inland Waterways Corporation.

SEC. 2. *Performance of functions of Secretary.*—The Secretary of Commerce may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Commerce of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

SEC. 3. *Administrative Assistant Secretary.*—There shall be in the Department of Commerce an Administrative Assistant Secretary of Commerce, who shall be appointed, with the approval of the President, by the Secretary of Commerce under the classified civil service, who shall perform such duties as the Secretary of Commerce shall prescribe, and who shall receive compensation at the rate of \$14,000 per annum.

SEC. 4. *Incidental transfers.*—The Secretary of Commerce may from time to time effect such transfers within the Department of Commerce of any of the records, property, personnel, and unexpended balances (available or to be made available) of appropriations, allocations, and other funds of such Department as he may deem necessary in order to carry out the provisions of this reorganization plan.

## THE PATENT OFFICE—THE REASON FOR

Evidently believing that genius and effort should be rewarded, the public protected, the framers of the Constitution provided that—

The Congress shall have power \* \* \* To promote the Progress of science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.<sup>2</sup>

To implement that constitutional provision, as far back as April 10, 1790, the Congress enacted legislation to promote the purpose therein enunciated.

In 1802, the Patent Office was established as a distinct bureau in the Department of State with an official then known as the Superintendent of Patents.

There was a general revision of the patent laws in July of 1836, when the Office was reorganized and the official in charge was designated as Commissioner of Patents.

In 1849, the Patent Office was transferred to the Department of Interior and, in April of 1925, in accordance with statutory authority previously given, it was transferred to the Department of Commerce. It now administers, not only the patent laws, but the Federal trademark laws under 15 United States Code 1051.

Notwithstanding the fact that the Patent Office, its officers, and employees are housed in the Department of Commerce,<sup>3</sup> it has been and is an independent quasi-judicial, quasi-legislative office,<sup>4</sup> with a history running back to the adoption of the Constitution.

The present statute creates the offices of Commissioner of Patents, one First Assistant Commissioner, two Assistant Commissioners, and nine Examiners in Chief appointed by the President by and with the advice and consent of the Senate. All other officers, clerks, and employees are appointed by the Secretary of Commerce upon the nomination of the Commissioner of Patents.<sup>5</sup>

The Commissioner of Patents, under the direction of the Secretary of Commerce, shall superintend or perform all duties respecting the granting and issuing of patents directed by law; and he shall have charge of all books, records, papers, models, machines, and other things belonging to the Patent Office. He may, subject to the approval of the Secretary of Commerce, from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office.

The Examiners in Chief shall be persons of competent legal knowledge and scientific ability. The Commissioner of Patents, the First Assistant Commissioner, the Assistant Commissioners, and the Examiners in Chief shall constitute a board of appeals, whose duty it shall be, on written petition of the appellant, to review and determine upon the validity of the adverse decisions of examiners upon applications for patents and for reissues of patents and in interference cases. Each appeal shall be heard by at least three members of the board of appeals, the members hearing such appeal to be designated by the Commissioner. The board of appeals shall have sole power to grant rehearings.<sup>6</sup>

Since 1870 the Patent Office has had a seal of its own.<sup>7</sup>

By subsequent statutory provisions of chapter 1 of title 35 of the code, covering 78 pages, the Congress over the years has attempted to safeguard the integrity of the Patent Office and the procedure govern-

<sup>2</sup> Art. I, sec. 8 the Constitution.

<sup>3</sup> 35 U. S. C., 1.

<sup>4</sup> *Buttwerth v. Hoe* (112 U. S. 50).

<sup>5</sup> 35 U. S. C., sec. 2.

<sup>6</sup> 35 U. S. C., secs 6 and 7.

<sup>7</sup> The seal provided for the Patent Office prior to July 8, 1870, shall be the seal of the Office, with which letters patent and papers issued from the Office shall be authenticated (U. S. C., title 35, sec. 3).

ing the granting and use of patents. The most casual reading of the statutory provisions shows clearly that the Patent Office was created as, and was intended to be, not an executive, but a quasi-judicial, quasi-legislative, office.

No protest has apparently been made to the enactment into law of Reorganization Plan 5 on behalf of any bureau purported to be covered by the plan except the United States Patent Office.

But as to that Office, industry and the entire patent bar have spoken as one in favor of the rejection of the plan, on the ground that the independence and efficiency of that Office should not be destroyed by including the Patent Office in the scope of its operation.

So far as appears, it has not been contended by any person interested in the welfare of the patent system that Reorganization Plan No. 5 is defective in any respect other than that it includes the Patent Office.

#### NO ECONOMY OR INCREASED EFFICIENCY

Industry and the patent bar are unanimous in the approval of all moves for economy and efficiency. But no showing has been made that economies would be realized or efficiency of operation increased by the enactment into law of plan 5 insofar as the operation of the Patent Office is concerned.

The Secretary of Commerce, who should know whether inclusion of the Patent Office in the operation of the plan would promote economy or increased efficiency of operation, has not so stated. That he does not believe that such economies can be effected or that efficiency can be increased is evident from the fact that he has issued assurances to the effect that, if Reorganization Plan 5 becomes law, he will immediately redelegate to the Commissioner of Patents and others in the Patent Office the duties and functions which they now perform.

It is clear that no change in the Patent Office structure is warranted at this time on the theory that economy and increased efficiency will result.

#### A JUDICIAL AGENCY

It is doubtful if there is any other executive bureau of the Government—any agency or office—more judicial in its functions than is the United States Patent Office. That its functions are judicial or quasi-judicial in nature is known throughout the land, to the hundreds of thousands of inventors who have received patents, to business, both big and little, to all manufacturers, and to all those who follow the legal profession.

Each application for patent is taken up for examination by an examiner who has especially qualified himself for that purpose. He has been selected by the Patent Office as a result of a written examination prepared by the Patent Office and solely on the basis of his knowledge and ability. Even the subordinate examiners are called upon to decide daily whether or not, in view of all the facts at hand and the applicable law, an applicant for patent has made an invention for which a patent should be issued.

The Patent Office as a whole is engaged daily in establishing or refusing to establish property rights of the citizens—a strictly judicial function. Judicial temperament of the highest quality is required, as is vast experience, extensive training, and a knowledge of the

patent law obtained by careful study of the decisions rendered from time to time by the Federal courts in patent cases.

The Board of Appeals of the Patent Office, comprising nine examiners, the Assistant Commissioners, and the Commissioner, are selected by the President because of special fitness and are confirmed by the Senate after investigation as to fitness. They are versed in the law and are eminently qualified to give proper weight to the many technical facts inherent in all patent decisions.

The Commissioner of Patents and Assistant Commissioners, and many subordinates, are likewise engaged day by day in the examination of applications for registration of trade-marks and, in the trade-mark field, the Commissioner has most important decisions to make.

Again, these decisions of the Commissioner are of a judicial nature, as has been recognized and established by the courts.

One most interesting decision establishing the fact that the Commissioner of Patents is entirely independent of his superior, insofar as his judicial acts are concerned, is the early case of *Butterworth v. Hoe* (112 U. S. 50). In that case—and it was decided in 1884—the Court in a unanimous decision called attention to one of the objectives of the patent law. It said:

The general object of that system is to execute the intention of that clause of the Constitution, article I, section 8, which confers upon Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The legislation based on this provision regards the right of property in the inventor as the medium of the public advantage derived from his invention; so that in every grant of the limited monopoly two interests are involved, that of the public, who are the grantors, and that of the patentee. There are thus two parties to every application for a patent, and more, when, as in case of interfering claims or patents, other private interests compete for preference. The questions of fact arising in this field find their answers in every department of physical science, in every branch of mechanical art; the questions of law, necessary to be applied in the settlement of this class of public and private rights, have founded a special branch of technical jurisprudence. The investigation of every claim presented involves the adjudication of disputed questions of fact, upon scientific or legal principles, and is, therefore, essentially judicial in its character, and requires the intelligent judgment of a trained body of skilled officials, expert in the various branches of science and art, learned in the history of invention, and proceeding by fixed rules to systematic conclusions (pp. 58-59).

Then the Court, speaking of the duties and functions of the Commissioner of Patents, said:

The conclusion cannot be resisted that, to whatever else supervision and direction on the part of the head of the Department may extend, in respect to matters purely administrative and executive they do not extend to a review of the action of the Commissioner of Patents in those cases in which, by law, he is appointed to exercise his discretion judicially. It is not consistent with the idea of judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates. Such a subjection takes from it the quality of a judicial act. That it was intended that the Commissioner of Patents, in issuing or withholding patents, in reissues, interferences, and extensions, should exercise quasi-judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed (p. 67).

The Secretary of Commerce may or may not be a lawyer but the Commissioners of Patents have always been chosen from the ranks of patent lawyers and, no doubt, on the theory that a patent lawyer of considerable capacity must be in charge of the Patent Office in order that it may function in a proper manner. If it were not for the fact

that the Commissioner must necessarily perform judicial functions, any good administrator could be placed in charge of the Patent Office. But the Commissioner, Assistant Commissioners, members of the board, and other members of the examining corps function as judges in patent matters.

The Commissioner has, among his judicial functions—

- (a) The right to decide appeals as a member of the board of appeals (35 U. S. C. 7);
- (b) The right to disbar attorneys (35 U. S. C. 11);
- (c) The right to determine who shall receive patents (35 U. S. C. 36);
- (d) The right to decide which invention shall be kept secret and which made public (35 U. S. C. 42);
- (e) The right to decide whether or not an interference should be declared between two applicants for the same invention (35 U. S. C. 52); and

In trade-mark matters, the Commissioner has—

- (a) The right to decide who shall receive certificates (15 U. S. C. 1051);
- (b) The right to decide inter partes controversies between rival applicants for registration (15 U. S. C. 1068);
- (c) The right to decide all controversies on appeal (15 U. S. C. 1070); and
- (d) The right to prescribe rules and regulations governing trade-mark registration procedures (15 U. S. C. 1051).

The Commissioner also has certain supervisory functions over which the Secretary of Commerce has presently only a veto power and these functions are of importance, although not as important as his judicial functions. Thus he—

- (a) Selects his employees, although the Secretary must actually appoint them (35 U. S. C. 2);
- (b) Makes the rules under which the Patent Office operates, although here the Secretary has a veto power (35 U. S. C. 6); and
- (c) Performs all duties relative to the lawful issue of patents subject to the direction of the Secretary (35 U. S. C. 6).

These various functions as above set forth will all be transferred to the Secretary of Commerce if the reorganization plan becomes law.

The Secretary of Commerce is a political appointee, a very busy man. No Secretary of Commerce has ever been a patent lawyer and none is likely to be versed in patent law through experience. The Secretary will, therefore, inevitably be forced to exercise his right to redelegate powers to the Commissioner and to others in the Patent Office, as the present Secretary has promised to do. But no Secretary is required by the plan to redelegate the functions which he acquires under the plan to any certain individual in the Patent Office.

#### THE AMERICAN WAY, OUR WAY

Whatever else may be said of “a profit motive” or “the incentive system,” the writers of the Declaration of Independence seemed to feel that ability and the use of it were desirable and to be encouraged.

Few, if any, will argue that we as a people are superior either physically or mentally to those in other lands—in fact, our Nation has often been referred to as the “melting pot of the world.” We are of no distinct race, creed, or color but, as a Nation, under our system of

government, we have the greatest degree of individual liberty, freedom of action, and material prosperity possessed by any people. Hence, it must be our system of government rather than our physical or mental characteristics which has made us what we are.

One of the important factors contributing to the attainment of that enviable position in the world is the fact that the Congress has wisely exercised the power given it by the Constitution "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries", when it created the office of Commissioner of Patents, making it a quasi-judicial position, requiring that examiners be men of ability with technical training, insisting that the Office be free from political interference, its decisions reviewable only by the courts.

As to the wisdom of the proposition that, at least for a limited time, the individual who, through the exercise of his talent, created something new and useful should enjoy the benefit of his effort, there was evidently some argument at the time the Constitution was written; otherwise, express protection would not have been given by section 8 of article I of that document.

The Patent Question Under Free Trade, published in London in 1864; Copyright and Patents for Inventions—Pleas and Plans for Cheaper Books and Greater Industrial Freedom, published in London, Paris, New York, and Philadelphia in 1883, indicate that the arguments submitted to the writers of the Constitution still continue.

In December of 1941, President Franklin D. Roosevelt, by Executive order, appointed a National Patent Planning Commission, for the purpose of making a study—

of our existing patent laws and procedure, together with appropriate action taken by a commission familiar with the problems of science, industry, agriculture, labor, and the consumer.

The National Patent Planning Commission in its report stated:

This system has accomplished all that the framers of the Constitution intended. It is the only provision of the Government for the promotion of invention and discovery and is the basis upon which our entire industrial civilization rests \* \* \* the basic principles of the present system should be preserved.

In recent years, there has been advanced by those who would share the wealth, take from those who have to give to those who have not, established socialism, the proposition that the laws giving and protecting patents and copyrights should be repealed. It has been argued, and by honest and sincere individuals, that even though one may work long and intensely in an effort to discover something new and useful when successful the result should be freely, without compensation, given to all.

The question as to just how far the Congress and the courts should go under the constitutional power "to promote the progress of science and useful arts" has perplexed the Justices of the United States Supreme Court.

It has been affirmatively established by the Court that for a limited period a patentee has a monopoly in the use of his patent. As to just how far the patentee can go by agreement with others in authorizing or limiting by the licenses the use of that patent, raises another question, i. e., whether the agreement violates the Sherman Act prohibiting monopolies.

In the case of *U. S. v. Line Material Company*<sup>8</sup> three opinions were written. In the prevailing opinion it was said that it was well settled—that the possession of a valid patent or patents does not give the patentee any exemption from the provision of the Sherman Act beyond the limits of the patent monopoly.

Mr. Justice Douglas, with whom Justices Black, Murphy, and Rutledge concurred, agreeing with the majority in holding the agreement in the Line Material case to be a violation of the Sherman Act, desired to overrule a previous decision of the Court in *U. S. v. General Electric Company*,<sup>9</sup> in which it was held that certain price-fixing agreements were not a violation of the Sherman Act, said:

But I would be rid of *United States v. General Electric Company*.

Justice Douglas evidently would strictly limit the monopoly given a patentee.<sup>10</sup>

Writing of the attempt of the Government to limit the application of the General Electric case and to make that decision applicable to the case then pending, the dissenting judges wrote:

The long and unfaltering development of our patent law often has been touched upon in our decisions. However, in the face of the direct attack now made upon some of its underlying principles, the infinite importance of our inventions justifies

<sup>8</sup> 333 U. S. 287.

<sup>9</sup> 272 U. S. 476.

<sup>10</sup> The Justice further said:

"Congress, faithful to that standard, has granted patentees only the 'exclusive right to make, use, and vend the invention or discovery.' \* \* \* And as early as 1853 the Court, speaking through Chief Justice Taney, defined the narrow and limited monopoly granted under the statutes as follows: 'The franchise which the patent grants consists altogether in the right to exclude everyone from making, using, or vending the thing patented, without the permission of the patentee.'"

"\* \* \* The effort through the years has been to expand the narrow monopoly of the patent. The Court, however, has generally been faithful to the standard of the Constitution, has recognized that the public interest comes first and reward to inventors second, and has refused to let the self-interest of patentees come into the ascendency. As we stated in *B. B. Chemical Co. v. Ellis* (314 U. S. 495, 498), 'The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant.' From *Motion Picture Patents Co. v. Universal Film Mfg. Co.* (243 U. S. 502), which overruled *Henry v. A. B. Dick Co.* (224 U. S. 1), to *International Salt Co. v. United States* (332 U. S. 392), decided only the other day, the Court has quite consistently refused to allow the patentee's 'right to exclude' to be expanded into a right to license the patent on such conditions as the patentee might choose. For the power to attach conditions would enable the patentee to enlarge his monopoly by contract and evade the requirements of the general law applicable to all property. The philosophy of those decisions was summed up in *Mercoind Corp. v. Mid-Continent Investment Co.* (320 U. S. 661, 666), where we said:

"The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly. The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. \* \* \* The patent is a privilege. But it is a privilege which is conditioned by a public purpose. It results from invention and is limited to the invention which it defines. When the patentee ties something else to his invention, he acts only by virtue of his right as the owner of property to make contracts concerning it and not otherwise. He then is subject to all the limitations upon that right which the general law imposes upon such contracts."

"The Court, however, allowed an exception in this long line of cases. In *United States v. General Electric Co.*, supra, decided in 1926, it followed *Bement v. National Harrow Co.* (186 U. S. 70), decided in 1902, and sustained a price-fixing provision of a license to make and vend the patented invention. By that decision price-fixing combinations which are outlawed by the Sherman Act (*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150) were held to be lawful when the property involved was a patent. By what authority was this done?

"The patent statutes do not sanction price-fixing combinations. They are indeed wholly silent about combinations. So far as relevant here, all they grant, as already noted, is the 'exclusive right to make, use and vend the invention or discovery' (Rev. Stat., sec. 4884, 35 U. S. C. sec. 40). There is no grant of power to combine with others to fix the price of patented products. Since the patent statutes are silent on the subject, it would seem that the validity of price-fixing combinations in this field would be governed by general law. And since the Sherman Act outlaws price-fixing combinations it would seem logical and in keeping with the public policy expressed in that legislation to apply its prohibitions to patents as well as to other property. The Court made an exception in the case of these price-fixing combinations in order to make the patent monopoly a more valuable one to the patentee. It was concerned with giving him as high a reward as possible. It reasoned that if the patentee could not control the price at which his licensees sold the patented article, they might undersell him; that a price-fixing combination would give him protection against that contingency and therefore was a reasonable device to secure him a pecuniary reward for his invention. Thus the General Electric case inverted clause 8 of article I, section 8 of the Constitution and made the inventor's reward the prime rather than an incidental object of the patent system."

"In that manner the Court saddled the economy with a vicious monopoly. \* \* \*

a brief review here of the development and nature of the patent rights attacked. \* \* \*

Mr. Justice Burton, with whom the Chief Justice and Mr. Justice Frankfurter concurred in dissenting, recognizing the attempt to limit the reward given a patentee, called attention to the fact that a patent was—

\* \* \* a reward for the invention or discovery of something new, something before unknown, something added to the sum total of human knowledge, utility, well-being; something which the inventor or discoverer, despising the lure of money or fame, might have withheld from his fellow men. By the monopoly that goes with a patent, then, the Government recompenses and, for a limited time, protects the inventor or discoverer who gives to the world the use and benefit of his invention or discovery. This is a kind and a degree of mutuality that negates monopoly in the old or the current concept. Monopoly in the latter sense of the term gave to an individual or a group complete dominion of something already existent. A patent awards monopoly to the producer of something original, something superadded to the common store. So it is that two things bearing the same name need not be of the same nature.

It has been contended that there sometimes occurs a clash between the anti-trust laws and the patent statutes. I might suggest that since the first antitrust legislation in 1890, the patent laws and the antitrust laws have coexisted without any irreconcilable conflicts between them. They have each of them at least one common objective; namely, the retention by the public of a right once acquired by it. As a matter of fact, patents accomplished more than the retention of the acquired rights. Their influence is creative; they operate to multiply and expand acquisitions by the public.<sup>12</sup>

The Justice then added:

The exceptional recent activity in seeking, by statutory amendment, a change in the patent laws as interpreted in the Bement and General Electric cases indicates a widespread understanding that, if such interpretation is to be changed, the remedy calls for congressional action. The resistance to such a change which has been shown by Congress is impressive.<sup>13</sup> \* \* \*

<sup>12</sup> Many bills relating to these issues have been introduced in Congress and referred to appropriate committees. Not one has been reported back to either House of Congress.

As early as 1912, H. R. 22345, 62d Cong., 2d sess., proposed that a patentee be not permitted to fix the price of articles to be sold by others under his patent.

During the hearings held by the Temporary National Economic Committee, the Department of Justice recommended many fundamental as well as minor changes in the patent law. These included the prohibition of price-limiting patent licenses comparable to those here at issue (Preliminary Report, Temporary National Economic Committee, S. Doc. No. 95, 76th Cong., 1st sess., pp. 16-17 (1939)).

The Department of Commerce took an opposite position. It submitted recommendations for retaining but improving the patent system substantially in accordance with its traditional underlying policies. The Final Report of the Temporary National Economic Committee incorporated the substance of the proposals of the Department of Justice. It included a recommendation that patentees be not permitted to limit the price at which a licensee might sell a product made under the license (Final Report, Temporary National Economic Committee, S. Doc. No. 35, 77th Cong., 1st sess., pp. 36-37 (1941)).

In 1941, the President appointed the National Patent Planning Commission to submit recommendations on questions dealt with in the report. \* \* \*

In 1943, among the examples of the proposed reforms which it concluded "would not be a beneficial innovation in our patent system," it listed "outlawing certain limitations in patent licenses, \* \* \*." This evidently referred to the above-mentioned proposals of the Temporary National Economic Committee to outlaw price restrictions and other limitations in patent licenses (Report of the National Patent Planning Commission, H. Doc. No. 239, 78th Cong., 1st sess., p. 9 (1943)).

Bills to the same general effect as the proposals of the Temporary National Economic Committee have been introduced and referred to committees of Congress but have advanced no further.

Under the authority given it by the Constitution, the Congress has consistently sought to encourage inventions by giving the patentee a limited monopoly and, through the Sherman Act, preventing the misuse of that monopoly. The courts through the years have upheld Congress in that attempt. It would be most unwise, by the indirect method proposed in this plan, to make it possible for a political appointee to destroy the established legislative and judicial policy with reference to patents.

<sup>11</sup> 333 U. S. 311, 332.

<sup>12</sup> 333 U. S. 338, 339.

<sup>13</sup> 333 U. S. 312.



To date, the Patent Office has been and now is a quasi-judicial office. It has served the inventor and the public with ability and fairness.

Plan No. 5 would discard the method of dealing with patents as it has been established by the Congress and the courts, destroy the judicial character of the Patent Office, make it a part of, and subject to, a political appointee.

The Secretary of Commerce is a busy man. Obviously, he has no time to himself perform the functions of a Commissioner of Patents or of any member of that organization, nor does the plan contemplate that he shall perform any of those functions. If the plan becomes law, he is authorized to, and necessarily he must, redelegate those functions to individuals of his own choosing.

While the statute creating the Department of Commerce outlines and circumscribes some of the duties of the Secretary of Commerce, he is nevertheless a part of, and subject to and guided by a political machine. Under the two-party system of government, that is to be expected—it is inevitable. A political party operates from the top down and the Secretary of Commerce can but carry out, implement, the political philosophy of his party.

A Henry Wallace was once Vice President. But for a turn in fortune's wheel he might have been President. He was Secretary of Commerce. Most people are familiar with some of Henry Wallace's political theories. Had plan No. 5 been in effect when he was Secretary of Commerce, would he, who advocated the killing of little pigs, the plowing under of crops, the giving of a pint of milk to everyone in the wide, wide world, have been an advocate of legislation to repeal the laws protecting patents and trade-marks?

Economy and efficiency are desirable, but far more desirable and essential to people who would be free is the integrity and independence of those who interpret and administer our laws. As suggested by Justice Brandeis, efficiency and economy mean little to the individual who has lost his freedom of action.

Plan No. 5 should be rejected, for it gives no promise of either efficiency or economy, it would destroy the integrity of an agency which has functioned without serious criticism, which has promoted the progress of science and useful arts, encouraged the able and industrious, while, at the same time, it has protected the public.

Plan No. 5 should be rejected by an affirmative vote for House Resolution 546.

Respectfully submitted.

CLARE E. HOFFMAN.

